(2)

No. 91-328

Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

KEITH FARRELL, WILLIAM MURRAY,
RICHARD RICHARDSON,

Petitioners,

v.

AUTOMOBILE CLUB OF MICHIGAN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM G. JAMIESON*
GARY R. CHOPP
JEFFREY R. LEARNED
VICTOR J. TORRES
DENENBERG, TUFFLEY, BOCAN, JAMIESON, BLACK, HOPKINS & EWALD, P.C.
3000 Town Center,
28th Floor
Southfield, Michigan 48075
(313) 358-5500

WILLIAM H. MORMAN
AUTOMOBILE CLUB OF MICHIGAN
One Auto Club Drive
Dearborn, Michigan 48126
(313) 336-1048

Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether Petitioners may maintain an action for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), where they request relief for themselves as individual plan beneficiaries, yet ERISA, as interpreted by this Court in *Massachusetts Mutual Life Insurance Co. v Russell*, permits such an action only where relief is sought for the plan as a whole?

II. Whether Respondent complied with both ERISA and its own retirement plan in using a 10% discount factor when calculating the lump sum, actuarial equivalent of new supplemental early retirement benefits, where (1) the District Court found substantial compliance, and (2) Petitioners failed to present any evidence establishing non-compliance?

III. Whether Respondent's alleged violation of ERISA reporting requirements is actionable, where (1) Petitioners were apprised of all pertinent, required information, and (2) Petitioners were not injured or prejudiced by this alleged violation?

IV. Whether Petitioners may seek review of the Court of Appeals' affirmance of the District Court's dismissal of pendent state law claims, where the Court of Appeal's Judgment was issued March 28, 1989, yet Petitioners failed to seek review of this Judgment until May of 1991?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. Statement Of Material Facts 4

1. Nature of this case 4

2. The implementation of the SERO 5

3. Proceedings below 8

B. Misstatements Of Fact In The Petition 9

REASONS FOR DENYING THE PETITION 13

A. The Petition Should Be Denied Because Petitioners' Breach Of Fiduciary Duty Claim Is Untenable As A Matter Of Law 14

1. This Court's decision in *Massachusetts Mutual* precludes Petitioners' claim 14

2. Petitioners' "spirit" of Rev. Rul. 79-90 argument is without merit 16

B. The Petition Should Be Denied Because Respondent Complied With Both ERISA And Its Own Retirement Plan In Using A 10% Discount Factor In Calculating Lump Sum SERO Supplemental Benefits 17

TABLE OF CONTENTS – Continued

Page

1. The Plan complied with ERISA 18

2. The adoption of the SERO, and use of the 10% discount factor, complied with the Plan 21

C. The Petition Should Be Denied Because Petitioners Were Not Injured Or Prejudiced By The Alleged Violation Of ERISA Reporting Requirements, And Respondent Made Full Disclosure Of All Required Information 23

D. The Petition Should Be Denied Because Petitioners' Appeal From The Dismissal Of Their Pendent State Law Claims Is Not Timely 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Bryant v International Fruit Produce Co., Inc., 886 F.2d 132 (6th Cir. 1989) 15

Dooley v American Airlines, Inc., 797 F.2d 1447 (7th Cir. 1986), *cert denied*, 479 U.S. 1032, 107 S. Ct. 879, 93 L.Ed.2d 833 (1987) 17

Farrell v Automobile Club of Michigan, 870 F.2d 1129 (6th Cir. 1989) 2, 15, 16

Firestone Tire & Rubber Company v Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989) 24

Henne v Allis-Chalmers Corp., 660 F. Supp. 1464 (E.D. Wis. 1987) 20

Jones v National Distillers & Chemical Corp., 484 F. Supp. 679 (S.D. N.Y. 1979) 23

Kammenstein v Jordan Marsh Co., 623 F. Supp. 1109 (D. Mass. 1985) 24, 26

Massachusetts Mutual Life Insurance Co. v Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) 14, 15

Mehl v Navistar International Corp., 670 F. Supp. 239 (N.D. Ill. 1987) 15

Merit Motors, Inc. v Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977) 23

Nachwalter v Christie, 805 F.2d 956 (11th Cir. 1986) 20

National Labor Relations Board v Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 102 S. Ct. 216, 70 L.Ed.2d 325 (1981) 13

TABLE OF AUTHORITIES – Continued

Page

Risch v Waukesha Title Company Inc., 588 F. Supp. 69 (E.D. Wis. 1984), *aff'd*, 776 F.2d 1049 (7th Cir. 1985) 26

Rubin v Decision Concepts, Inc., 566 F. Supp. 1057 (S.D. N.Y. 1983) 25

Rudolph v United States, 370 U.S. 269, 82 S. Ct. 1277, 8 L.Ed.2d 484 (1962) 13

Southern Power Co. v North Carolina Public Service Co., 263 U.S. 508, 44 S. Ct. 164, 68 L.Ed.2d 413 (1924) 13

STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2101(c) 3, 27

29 U.S.C. § 1022(a) 24

29 U.S.C. § 1102(b) 18, 20

29 U.S.C. § 1109 ..... 14, 15, 16

29 U.S.C. § 1132(a)(1)(B) 9, 14, 15, 16, 17

29 U.S.C. § 1132(a)(2) 15

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.1 ..... 3, 27

Rule 15.1 9

Rule 15.2 1

Rule 24.1(b) 1

Rule 29.1 1

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Rev. Rul. 79-90, 1979-1 C.B. 156 17

No. 91-328

In The

Supreme Court of the United States

October Term, 1991

KEITH FARRELL, WILLIAM MURRAY,
RICHARD RICHARDSON,

Petitioners,

v.

AUTOMOBILE CLUB OF MICHIGAN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Automobile Club of Michigan ("Respondent"), files its Brief in Opposition to the Petition for Writ of Certiorari ("the Petition") of Petitioners, Keith Farrell, William Murray and Richard Richardson ("Petitioners").[1]

[1] The caption of this case contains the names of all parties. Accordingly, repetition is unnecessary pursuant to Rules 15.2 and 24.1(b) of the Rules of the Supreme Court of the United States. In addition, pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that there are no parent companies or subsidiaries (not wholly owned) of Respondent that require listing.

OPINIONS BELOW

With respect to all issues excluding pendent jurisdiction, the bench opinions of the United States District Court for the Eastern District of Michigan are set forth in Appendix A to the Petition, pages 42-56 (decision of July 13, 1989) and pages 76-93 (decision of November 30, 1989). An Order and Judgment granting Respondent's Motions for Summary Judgment, entered December 12, 1989, are set forth in Appendix A to the Petition, pages 94-99.[2] The March 1, 1991, per curiam Opinion of the Court of Appeals, which affirmed the opinions of the District Court for all the reasons stated therein, is unpublished and is set forth in Appendix A to the Petition, pages 100-101.

With respect to the pendent jurisdiction issue, the unpublished Memorandum Opinion and Order and Judgment of the United States District Court for the Eastern District of Michigan, dated December 18, 1987, are set forth in Appendix A to the Petition, pages 2-10. The March 28, 1989, Opinion of the Court of Appeals, affirming the dismissal of Petitioners' pendent state law claims, is set forth in Appendix A to the Petition, pages 11-31, and is reported in the Federal Reporter, Second Series. *Farrell v Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. 1989).

---

[2] The Order and Judgment are not properly organized in Appendix A. The Order is actually found at pages 94, 95 and 99. The Judgment is found starting at pages 97 and 98, and concluding on page 96.

JURISDICTION

With respect to all issues excluding pendent jurisdiction, the Judgment of the Court of Appeals was entered March 1, 1991 (Appendix A to the Petition, pages 100-101). Jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

With respect to the pendent jurisdiction issue, the Judgment of the Court of Appeals was entered March 28, 1989 (Appendix A to the Petition, pages 11-31). Petitioners contend jurisdiction exists pursuant to 28 U.S.C. § 1254(1). Respondent disagrees. Petitioners failed to file a Petition for Writ of Certiorari within ninety (90) days of the March 28, 1989, Court of Appeals Judgment, as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States. Accordingly, as to pendent jurisdiction, the Petition is jurisdictionally deficient.

STATUTE INVOLVED

The statute involved in this matter is the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq.

STATEMENT OF THE CASE

The Statement of the Case found in the Petition is confusing, contains a great deal of irrelevant information[3]

[3] Throughout the Petition, reference is made to "facts" which purportedly imply that Respondent was engaging in age

(Continued on following page)

and contains many misstatements of fact. Consequently, Respondent will first present a clear and concise statement of the underlying facts, and will then discuss the most egregious factual misstatements made by Petitioners.

A. Statement Of Material Facts

1. Nature of this case

Petitioners are former management employees of Respondent. In July 1980, Respondent extended a Special Early Retirement Offer ("SERO") to employees who were eligible for early retirement under Respondent's existing pension plan ("the Plan"). Each Petitioner elected to accept the SERO, and opted to receive retirement benefits in one lump sum (as opposed to monthly payments). Petitioners brought the instant action, claiming that Respondent improperly calculated the lump sum equivalent of their SERO supplemental monthly benefits in violation of ERISA. Petitioners did not claim, nor have they ever claimed, that the calculation of their accrued ERISA benefits was inaccurate or improper.

Petitioners argue that Respondent's use of a 10% discount factor for converting their SERO supplemental

---

(Continued from previous page)

discrimination in connection with the Special Early Retirement Offer. Respondent categorically denies any discriminatory intent. More importantly, there is no age discrimination claim properly before this Court, as the District Court declined to exercise pendent jurisdiction over this state law claim. Therefore, any "facts" or argument concerning age discrimination are irrelevant.

monthly benefits into a lump sum breached ERISA-imposed fiduciary duties, and was improper under ERISA regulatory provisions and the terms of the Plan. In addition, Petitioners argue that Respondent violated ERISA reporting and/or disclosure requirements related to the SERO. Finally, Petitioners argue that the District Court's dismissal of their pendent state law breach of contract and age discrimination claims was inappropriate.

Respondent contends that Petitioners do not have a viable ERISA claim for breach of fiduciary duty, and the use of a 10% lump sum discount factor 1) did not violate any ERISA regulatory provisions, and 2) was authorized under the Plan. Respondent also asserts that any alleged ERISA reporting violation is not actionable given the substantial disclosures made to Petitioners concerning the SERO, along with the fact that Petitioners are unable to demonstrate that they were prejudiced or injured as a result of the alleged reporting violation. Finally, Respondent contends that Petitioners' argument concerning the dismissal of pendent state law claims 1) is jurisdictionally out of time, and 2) is moot.[4]

2. The implementation of the SERO

In or about September 1979, Mr. Frederick Schrock, Respondent's Manager of Benefits and Compensation,

---

[4] This is due to the fact that Petitioners have learned that these pendent state law claims, pending in the Michigan state courts (specifically, the Wayne County Circuit Court), have been settled, and the underlying state court action has been dismissed.

was assigned the task of researching options and developing alternatives for providing a special early retirement program for Respondent's salaried employees. Mr. Schrock's responsibilities included administration of Respondent's existing retirement program. He also served as a member and/or Secretary of Respondent's Pension Advisory Committee ("the Committee"). Mr. Schrock contacted Respondent's actuaries, the Wyatt Company, to request that they develop various options for payment of benefits under a proposed SERO.

Under the proposed SERO, Respondent's salaried employees who otherwise qualified for early retirement would receive **supplemental** monthly benefits **in addition to** the regular accrued monthly benefits they would normally receive upon early retirement. Thus, the SERO was composed of two types of benefits: regular (pre-existing) accrued monthly benefits available upon early retirement and supplemental monthly benefits (offered for the first time in the SERO). The proposed SERO also gave eligible employees the option to receive their benefits in a lump sum. Employees who opted to receive lump sum payment of SERO benefits would receive the "actuarial equivalent" of supplemental monthly benefits that would otherwise be received.

The Wyatt Company informed Mr. Schrock that use of a 10% discount factor would actuarially equate lump sum payment of SERO supplemental benefits to payment of SERO supplemental benefits under a monthly plan.[5]

---

[5] Pursuant to Plan requirements, Respondent continued to use the pre-existing 6% lump sum discount factor for **regular accrued** monthly benefits (as opposed to **supplemental** monthly benefits).

The Wyatt Company also determined that use of a discount rate even higher than 10% would be actuarially equitable given the prevailing interest rates of the time.

Based on the information provided by the Wyatt Company, Mr. Schrock determined that use of a 10% factor to discount SERO supplemental benefits of employees who elected to receive benefits in lump sum was appropriate. Mr. Schrock then approached Mr. James Gawne, Respondent's Personnel Director and Chairman of the Committee, with the recommendation of a 10% lump sum discount factor for SERO supplemental benefits. After consultation, Mr. Schrock and Mr. Gawne agreed to recommend a 10% lump sum discount factor when the proposed SERO was presented to Respondent's Board of Directors. At its regularly scheduled June 24, 1980 meeting, Respondent's Board approved the proposed SERO as recommended.

Respondent announced the availability of the SERO to all employees on June 30, 1980. The announcement provided, in part, that eligible employees who accepted the SERO would "receive the benefits presently specified in the retirement plan, plus . . . additional benefits." The announcement also provided that if the lump sum option was taken, the employee would receive the "lump sum actuarial equivalent" of supplemental monthly benefits. After this initial announcement, all employees eligible for the SERO (including each Petitioner) received a follow-up notice which 1) reiterated the general terms of SERO benefits, and 2) contained a personal benefit statement which disclosed benefits available under normal early retirement and those available under the SERO. Each eligible employee was also given a retirement benefits

statement which detailed the various payment options available to employees who accepted the SERO.

In addition to the various notices and personal benefit statements concerning the SERO which were sent to all eligible employees, Respondent conducted group meetings (one of which Petitioner Farrell attended) to discuss existing pension plans and other benefits for retired employees, and to answer employee questions concerning retirement and the SERO. Respondent also encouraged eligible employees to contact the Personnel Department with any questions about the SERO. Petitioner Richardson did in fact both phone and personally meet with Mr. Schrock, as well as meet with Mr. Gawne, to discuss the SERO, and he received all the retirement information he requested.

In total, 247 employees were eligible for the SERO, and 135 accepted, including all three Petitioners. Each Petitioner elected to receive benefits in lump sum. Petitioner Murray received $191,174.00, Petitioner Farrell received $151,210.00 and Petitioner Richardson received $180,057.00. Each Petitioner received the amount they were advised they were eligible to receive in their Personal Benefit Statement.

3. Proceedings below

Petitioners' description of the "Litigation History" of this case (Petition, pages 16-21) is essentially accurate, but requires supplementation in two important respects. First, Petitioners never filed a Petition for Writ of Certiorari with this Court after the Court of Appeals' March 28, 1989, affirmance of the District Court's dismissal of

Petitioners' pendent state law claims. Second, the District Court's dismissal of Petitioners' ERISA claim for benefits [pursuant to 29 U.S.C. § 1132(a)(1)(B)] was based on three material facts to which there was no genuine issue: 1) the SERO 10% lump sum discount factor was actuarially equivalent (Appendix A to the Petition, page 52), 2) the Plan permitted the use of the 10% lump sum discount factor (Appendix A to Petition, pages 90-91), and 3) because Petitioners were provided with sufficient information concerning the SERO, and were not prejudiced by any failure to file materials with the Department of Labor, any alleged failure by Respondent to comply with ERISA reporting requirements was not actionable (Appendix A to Petition, pages 85-86).

B. Misstatements Of Fact In The Petition

While the Petition contains many misstatements concerning facts either not relevant to this case or not supported by the evidence, there are four particular misstatements which might mislead this Court into believing the facts are something other than what they really are. Pursuant to its obligation under Rule 15.1 of the Rules of the Supreme Court of the United States, Respondent will address each misstatement separately below.

The first misstatement is found on page 8 of the Petition, where it is alleged that Respondent failed to disclose the "changed" discount rate to Petitioners. This is misleading in several respects. First, there was no "changed" lump sum discount rate for SERO supplemental benefits, as these **supplemental** benefits had never

before been offered. The 10% rate was the one and only discount rate ever utilized at the time Petitioners opted for lump sum supplemental benefits. Second, this ignores all of the information (discussed in the previous section) that Respondents provided to Petitioners concerning the SERO. [This information is found at R. 105: Reply to Plaintiffs' Brief in Opposition to Defendant's Renewed Motion for Summary Judgment ("Renewed Motion Reply Brief"), Exhibits 2, 3 and 4]. Finally, it ignores the fact that under then applicable law, Respondent was under no obligation to disclose its lump sum discount rate.

The second misstatement is found on pages 8 and 9 of the Petition, where Petitioners represent that Petitioner Richardson was given false information when he asked further questions about the SERO, and Petitioner Murray was denied important information he requested. These assertions are not supported by the record. With respect to Petitioner Murray, the **only** claimed support for this assertion is page 47 of his deposition (R. 52). However, this testimony does not relate to information concerning the SERO he asked for but did not receive. Rather, this testimony simply refers to Petitioner Murray's suspicions that he was being "nudged" to accept the SERO because of his age.[6]

The allegations concerning Petitioner Richardson are similarly unfounded. The Petition relies on a "comparison" of a late 1980 letter by Mr. Schrock to Petitioner Richardson (answering Petitioner Richardson's request

---

[6] Once again, not only does Respondent deny any discriminatory intent, this testimony is irrelevant as there is no age discrimination claim properly before this Court.

for additional SERO information) and handwritten calculations of projected retirement benefits for Petitioner Richardson (presumably made by the Wyatt Company). (R. 50: Plaintiffs' Brief in Response to Defendant's Motion for Partial Dismissal, Exhibits 4 and 5). However, a review of these two documents demonstrates that there are no inconsistencies. Indeed, the Wyatt calculations are incorporated in the Schrock letter. More importantly, Petitioners' own expert, Craig Arnold, testified that Respondent responded appropriately to Petitioner Richardson's requests for additional information. (R. 51: Deposition of Craig Arnold, p.85).

The third misstatement, found at page 10 of the Petition, is a statement that Respondent "misrepresented" to employees that the SERO provided "payment of your earned benefit without reduction." Once again, there is no support in the record for this assertion. The statement in question (that there would be no reduction in earned benefits) was made by Respondent to explain one of several advantages of the SERO. Absent the SERO, the Plan provided that retirement benefits (earned benefits) would be reduced upon early retirement (as permitted by existing regulations). One component of SERO supplemental benefits was the elimination of this pre-existing reduction in earned benefits, thereby resulting in a net increase in benefits for SERO participants.[7] Accordingly, the effect of the SERO was that there would no

---

[7] According to Petitioners' own expert Respondent kept its word, as regular accrued monthly benefits were fairly figured and computed. (R. 55: Continuing Deposition of Craig Arnold, p.74).

longer be a reduction in earned benefits, a fact accurately conveyed to Petitioners.

The fourth misstatement, found throughout pages 10 through 15 of the Petition, is a claim that Petitioners' expert, Mr. Arnold, concluded that Respondent 1) acted arbitrarily and capriciously in offering the SERO, and 2) the adoption of the 10% lump sum discount violated Plan provisions. This representation ignores critical testimony by Mr. Arnold that motivated the District Court to dismiss this action and the Court of Appeals to affirm this dismissal:

> [Mr. Jamieson (counsel for respondent)] I am not sure you answered my question. But is there anything wrong, improper, illegal, about using a 10% interest factor under the conditions that it was used in this plan?
>
> [Mr. Arnold] That's a two-part question – I'll have to answer in a two-part answer. One, the use of those two assumptions are not – is not, in my opinion, **is not to be wrong, illegal or wrongful**. My concern is that **there is no authority for its application that I can find – one**.

(R. 51: Deposition of Craig Arnold, p.49) (emphasis added).

This testimony establishes that 1) there was nothing wrong with Respondent's use of the 10% lump sum discount factor (it provided actuarial equivalence), and 2) there is no support for the assertion that use of the 10% discount factor for SERO supplemental monthly benefits violated Plan provisions. Not only does this testimony vitiate any other speculation entered into by Mr. Arnold

concerning the implementation of the SERO, it undercuts Petitioners' entire case.

REASONS FOR DENYING THE PETITION

Preliminarily, two important points must be made. First, to once again clarify matters, the SERO consisted of two components: **regular accrued** monthly benefits available upon early retirement and **supplemental** monthly benefits. Petitioners do not dispute Respondent's calculation of **regular accrued** monthly benefits, or the application of the 6% lump sum discount factor to these benefits. Petitioners' challenge is to the application of the 10% lump sum discount factor to SERO **supplemental** monthly benefits.

Second, the questions presented in the Petition turn solely upon alleged questions of fact or the construction of the Plan.[8] They do not involve important questions of federal law, nor do they involve conflicts between several United States Courts of Appeals. These alleged fact-based questions are not the type for which this Court grants certiorari. *National Labor Relations Board v Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, 102 S. Ct. 216, 70 L.Ed.2d 325 (1981); *Rudolph v United States*, 370 U.S. 269, 270, 82 S. Ct. 1277, 8 L.Ed.2d 484 (1962) (per curiam); *Southern Power Co. v North Carolina*

[8] Respondents deny that any genuine questions of fact exist. Instead, as is established below (particularly in Sections B and C), the District Court analyzed undisputed facts and clear Plan language in light of ERISA, and reached the inevitable conclusion that Petitioners' claims lacked merit.

Public Service Co., 263 U.S. 508, 509, 44 S. Ct. 164, 68 L.Ed. 413 (1924). For this reason alone the Petition should be denied.

A. The Petition Should Be Denied Because Petitioners' Breach Of Fiduciary Duty Claim Is Untenable As A Matter Of Law

1. This Court's decision in *Massachusetts Mutual* precludes Petitioners' claim

Throughout this litigation Petitioners have made confusing arguments and claims with respect to what they seek to recover pursuant to ERISA.[9] On the one hand, Petitioners seem to be making a claim for benefits owed pursuant to 29 U.S.C. § 1132(a)(1)(B) (discussed in further detail in Sections B and C below). On the other hand, much of what Petitioners have argued has been phrased with respect to a "breach of fiduciary duty" by Respondent, a claim that would be brought pursuant to 29 U.S.C. § 1109. Respondent denies that any breach of fiduciary duties has occurred. However, the existence of such a breach is a question that need not be answered. To the extent Petitioners are attempting to assert some sort of § 1109 claim for breach of fiduciary duties, the claim is untenable as a matter of law.

29 U.S.C. § 1109 provides that any fiduciary of an employee benefit plan that breaches its duties to plan participants shall be liable to the plan for any losses

---

[9] This Section addresses arguments made in pages 22 through 41 of the Petition.

resulting from the breach. This Court has previously held that a § 1109 suit for breach of fiduciary duties **must** be brought for the plan as a whole, not for individual plan beneficiaries. *Massachusetts Mutual Life Insurance Co. v Russell*, 473 U.S. 134, 140, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985). Such an action must be brought pursuant to 29 U.S.C. § 1132(a)(2) ("[a] civil action may be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109]).[10]

Pursuant to *Massachusetts Mutual*, Petitioners' § 1109 claim for breach of fiduciary duties is unacceptable. It is not disputed that Petitioners are requesting relief for themselves as individual plan beneficiaries, rather than relief for the Plan as a whole. As the Court of Appeals properly recognized when the instant case was first presented, such a fiduciary duty claim runs counter to *Massachusetts Mutual*. *Farrell*, 870 F.2d at 1133-1134 (Appendix

---

[10] Petitioners seem to argue that a breach of fiduciary duty claim could also be brought for individual plan beneficiaries (as opposed to for the plan as a whole) pursuant to 29 U.S.C. § 1132(a)(1)(B)("[a] civil action may be brought . . . to recover benefits due to him under the terms of his plan"). However, this is not consistent with the language of this particular ERISA statute. A breach of fiduciary duty violates § 1109, and § 1109 claims are actionable pursuant to § 1132(a)(2). There is no reason to make them implicitly actionable pursuant to § 1132(a)(1)(B), particularly since the sole motivation for doing so is to circumvent *Massachusetts Mutual*. *See Bryant v International Fruit Produce Co., Inc.*, 886 F.2d 132, 135 (6th Cir. 1989); *Mehl v Navistar International Corp.*, 670 F. Supp. 239, 242 (N.D. Ill. 1987).

A to the Petition, pages 26-27).[11] Notwithstanding the considerable effort expended by Petitioners concerning this issue, the outcome is clear: the Petition must be denied.

2. Petitioners' "spirit" of Rev. Rul. 79-90 argument is without merit

Petitioners contend that Respondent's failure to disclose that a 10% lump sum discount would be applied to SERO supplemental benefits violated the "spirit" of Rev. Rul. 79-90, 1979-1 C.B. 156. They argue that this alleged violation constitutes a breach of fiduciary duty and supports their claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). Because Petitioners make this argument in connection with the first three questions presented to this Court, Respondent will dispose of it before turning to Petitioners' 29 U.S.C. § 1132(a)(1)(B) claims.

Rev. Rul. 79-90 provides that whenever the amount of a benefit in an employee benefit plan will be determined by use of actuarial assumptions, "the assumptions to be used must be specified within the plan in a manner which precludes employer discretion." This might arguably require an employer to specify any lump sum discount factors used in the calculation of benefits. However, as to

---

[11] Indeed, the Court of Appeals gave Petitioners a great benefit of the doubt by construing their contentions as claims for benefits as opposed to § 1109 breach of fiduciary duty claims. If Petitioners were found to be asserting § 1109 claims, this entire case would have been time-barred. *See Farrell, supra.*

employee benefit plans in existence prior to March 12, 1979, Rev. Rul. 79-90 specifically delays its own effect until the first plan year after December 31, 1983. Since Respondent's Plan (of which the SERO was a part) existed prior to March 12, 1979, compliance with Rev. Rul. 79-90 was not required until after 1983 – well after the time period pertinent to the instant action.

Petitioners do not deny that on its face Rev. Rul. 79-90 does not apply to this case. Instead, they attempt to have it retroactively applied by invoking its "spirit." This argument is contrary to the Internal Revenue Service's belief that Rev. Rul. 79-90 was a novel decision, which should be phased in over a period of time. *Dooley v American Airlines, Inc.*, 797 F.2d 1447, 1452 (7th Cir. 1986), *cert denied*, 479 U.S. 1032, 107 S. Ct. 879, 93 L.Ed.2d 833 (1987). By attempting to invoke the "spirit" of this Revenue Ruling, Petitioners ask this Court to find that Respondent's noncompliance with regulations inapplicable during the time period pertinent to this action is an actionable omission. As stated in *Dooley*, this Court should "decline the . . . invitation to take this step." 797 F.2d at 1452. Respondent can and should only be held accountable for complying with legal requirements existing at the time the SERO was adopted, offered and accepted.

B. The Petition Should Be Denied Because Respondent Complied With Both ERISA And Its Own Retirement Plan In Using A 10% Discount Factor In Calculating Lump Sum SERO Supplemental Benefits

Petitioners make two arguments in connection with their 29 U.S.C. § 1132(a)(1)(B) claim for benefits. First,

they contend that Respondent did not comply with ERISA or the Plan in adopting the SERO and utilizing a 10% discount factor. Second, they contend that Respondent violated ERISA reporting requirements. The first argument will be addressed in the following discussion[12], while the second will be discussed in Section C. The result is the same as to both arguments – they do not justify granting the Petition.

1. The Plan complied with ERISA

While never stating so directly, Petitioners imply that the Plan itself did not comply with ERISA's general requirements for the establishment, administration and modification of retirement plans. This is patently untrue. ERISA's requirements in this regard are found at 29 U.S.C. § 1102(b), which provides in pertinent part:

> § 1102. **Establishment of Plan.**
>
> (b) **Requisite features of plan.** Every employee benefit plan shall –
>
> > (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure developed in Section 405(c)(1) [29 U.S.C. § 1105(c)(1)]),
> >
> > (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . .

---

[12] This Section addresses arguments made in pages 51 through 62 of the Petition.

The Twenty-First Restatement and Twenty-Second Amendment of the Plan were in effect at the time the SERO was offered and accepted.[13] General responsibilities for administration of the Plan were outlined in Article IX, Section 1:

> *Section 1. Allocation of Responsibility Among Fiduciaries.*
>
> . . . In general, the Employer shall have the sole responsibility for making the contributions necessary to provide benefits under the Plan as specified in Article VIII, and shall have the sole authority to appoint and remove the Trustee and members of the Committee, to select and change Insurance Companies, and to amend or terminate, in whole or in part, this Plan or the Trust. The Employer shall be the Plan Administrator for purposes of ERISA. The Committee shall have the sole responsibility for the day-to-day administration of the Plan, which responsibility is specifically described herein.

The Committee's functions were set out in further detail in Article IX, Section 2 of the Plan, which provides in pertinent part:

> *Section 2. Advisory Committee.*
>
> The Committee shall be responsible for the general administration of the Plan and for carrying out the provisions thereof. The Committee may from time to time establish rules for the administration of the Plan and the transaction of the

---

[13] These are attached as Exhibit B to R.93: Defendant's Revised Motion for Summary Judgment, and pertinent provisions are quoted in R.99: Defendant's Renewed Motion for Summary Judgment.

> Plan's business. In making any determination or rule, the Committee shall pursue uniform policies, and shall not discriminate in favor of or against any Employee or group of Employees. The Committee shall make all determinations as to the right of any person to a benefit . . .

While the Plan provided that the Committee was responsible for its general administration, the power to amend or modify was allocated to Respondent's Board:

> *Section 1. Amendment*
>
> The Employers jointly and severally reserve and shall have the right at any time and from time to time by action of their respective governing bodies to modify or amend in whole or in part any or all of the provisions of the Plan . . .

Article IX, Section 1.

The above quoted Plan provisions complied with ERISA requirements for plan features. The Plan allocated responsibility for operation and administration, and identified the persons with authority to amend the Plan. This satisfies the requirements of 29 U.S.C. § 1102(b). *Henne v Allis-Chalmers Corp.*, 660 F. Supp. 1464, 1481 (E.D. Wis. 1987). *See also Nachwalter v Christie*, 805 F.2d 956, 960 (11th Cir. 1986). Accordingly, because the Plan complied with ERISA, Petitioners' claim will have merit only if the adoption of the SERO or the use of the 10% discount factor did not comply with the Plan.

2. The adoption of the SERO, and use of the 10% discount factor, complied with the Plan

At its June 24, 1980, meeting, Respondent's Board approved the SERO as proposed. The Board acted pursuant to its authority to "modify or amend in whole or in part any or all of the provisions of the Plan" under Article IX, Section 1 of the Plan (quoted above). Subsequent to Board approval, the Committee made the SERO available to eligible employees pursuant to its responsibility for general administration of the Plan (as outlined in Article IX, Section 2, also quoted above). Consequently, the adoption of the SERO complied with the Plan.

Utilization of a 10% discount factor for lump sum payment of SERO supplemental monthly benefits also complied with the Plan. Article V, Section 5(b) Option F of the Plan required that all retirement benefit payment options made available by the Committee be actuarially equivalent to other Plan payment options. In Article II, Section 14, the Plan defined "actuarial equivalent" as follows:

> "Actuarial Equivalent" means a benefit of equivalent value when computed on the basis of such actuarial tables and interest rates as were last adopted for this purpose by the Employers and their actuaries and/or the Insurance Company.

In determining the appropriateness of the 10% lump sum discount factor for SERO supplemental monthly benefits, the critical language in the definition of "actuarial equivalent" is that benefits must have "equivalent value when computed on the basis of . . . interest rates **as were last adopted for this purpose**" by Respondent. (Emphasis

added). As previously stated, Respondent had never before offered supplemental monthly benefits in an early retirement benefits payment option. Therefore, Respondent was not bound to use a particular interest rate in computing the lump sum actuarial equivalent of SERO supplemental monthly benefits since there was no interest rate that had been "last adopted for this purpose."[14]

Although Respondent was not bound to use a specific interest rate, it did have to provide lump sum payment of SERO supplemental monthly benefits of "equivalent value." In recommending a 10% discount factor for SERO supplemental monthly benefits, Mr. Schrock relied on information provided by the Wyatt Company, Respondent's actuaries. They told him that use of a 10% factor would actuarially equate lump sum payment of SERO supplemental benefits to payment of these benefits on a monthly basis. Indeed, the Wyatt Company determined that a higher rate would be actuarially equivalent given the prevailing interest rates of the time.

Petitioners do not dispute that use of the 10% factor achieved actuarial equivalence. (R.51: Deposition of Craig Arnold, p.49; District Court, 7/13/89 bench opinion, Appendix A to the Petition, pages 51 and 52). Rather, Petitioners claim that use of a 10% discount rate for lump sum payment of SERO supplemental monthly benefits

---

[14] That Respondent adhered to the Plan re: the application of discount factors is also demonstrated by the fact that it used a 6% lump sum discount factor in providing regular accrued retirement benefits. This 6% factor was required by the Plan, as it was the rate "last adopted" in connection with the lump sum payment of regular accrued retirement benefits.

was unauthorized under the Plan. The **only** support for their allegation is their expert's (Mr. Arnold) unsubstantiated assertion that he could not "find" authority for use of the 10% discount factor. [R.51: Deposition of Craig Arnold, p.49 (reproduced above under "Statement of the Case")].

Petitioners' expert does not cite Plan provisions or omissions to support the conclusion that use of the 10% discount factor was unauthorized by or inconsistent with Plan provisions. He simply states that he was unable to "find" authority for use of the 10% discount factor. This unsupported assertion/speculation fails to create a genuine issue of material fact which might preclude summary judgment. *See Merit Motors, Inc. v Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977); *Jones v National Distillers & Chemical Corp.*, 484 F. Supp. 679 (S.D. N.Y. 1979).

When the record is objectively evaluated, the inevitable conclusion is that the District Court and Court of Appeals ruled appropriately. Use of the 10% discount factor achieves actuarial equivalence (as required by the Plan), and the terms of the Plan authorized the action taken by Respondent. All Petitioners provide is mere speculation unsupported by any fact. Further review by this Court is simply not required.

C. The Petition Should Be Denied Because Petitioners Were Not Injured Or Prejudiced By The Alleged Violation Of ERISA Reporting Requirements, And Respondent Made Full Disclosure Of All Required Information

Petitioners cite various ERISA reporting and disclosure requirements, and make unsupported assertions

that Respondent violated some or all of the cited provisions.[15] The only allegation of failure to comply with ERISA requirements which has any possible validity pertains to Respondent's failure to file with the Department of Labor ("DOL") a summary of the Plan modification concerning the SERO, as allegedly required by 29 U.S.C § 1022(a)(2).[16] As the District Court and Court of Appeals held, this claim is not actionable for several reasons.

First, Petitioners were apprised of all pertinent and required information. The Congressional purpose in enacting ERISA disclosure provisions is to insure that "the individual participant knows exactly where he stands with respect to the plan. . . . " *Firestone Tire & Rubber Company v Bruch*, 489 U.S. 101, 118, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989). Accordingly, if a plan participant receives the information which ERISA requires, the employer's failure to comply with ERISA reporting requirements is not actionable. *Kammenstein v Jordan*

---

[15] This Section addresses arguments made in pages 41 through 50 of the Petition.

[16] Respondent **admits** that it did not file a summary of material modification concerning the SERO with the DOL. This was due to the fact that Mr. Schrock did not believe that a filing was necessary because he did not consider the SERO a "material modification" under 29 U.S.C. § 1022. Respondent **does not admit** that this failure to file constitutes an ERISA violation. The question of whether ERISA was violated was never addressed by the District Court or the Court of Appeals, nor did it have to be. Respondent's position, adopted by these courts, was (and is) that even if this nonfiling constitutes an ERISA violation, it does not provide Petitioners with a cause of action.

Marsh Co., 623 F. Supp. 1109, 1112 (D. Mass. 1985); *Rubin v Decision Concepts, Inc.*, 566 F. Supp. 1057, 1058-1059 (S.D. N.Y. 1983).

Although Respondent did not file a summary of the Plan modification with the DOL, it informed Petitioners and other eligible employees of exactly where they stood with respect to the Plan and the SERO. In this regard, Respondent directs this Court's attention to the recitation in the "Statement of the Case" of all the information made available to Petitioners and all other employees. In short, as testified to by Mr. Schrock, the information that would have been filed with the DOL was contained in the SERO announcements sent to Respondent's employees. (R.105: Renewed Motion Reply Brief, Exhibit 1, 11/16/89 Affidavit of Frederick Schrock, ¶10).

Given the information disseminated to employees and other opportunities for group and individual counseling, the purpose behind ERISA reporting/disclosure requirements was realized. Petitioners have yet to identify any material information that they did not receive from Respondent that they would have received had a DOL filing been made. In addition, Petitioners have failed to provide any evidence to support their claim that Respondent provided inaccurate information concerning the SERO. Accordingly, Petitioners have no actionable claim.

A second reason why this claim lacks merit is that Petitioners have not established that they were injured or prejudiced by the nonfiling. To sustain a cause of action for a violation of ERISA's reporting or disclosure requirements, prejudice or injury must be demonstrated. Failure

to establish injury or prejudice means that no genuine issue of material fact exists, and the employer is entitled to judgment as a matter of law. *Kammenstein*, 623 F. Supp. at 1112; *Risch v Waukesha Title Company Inc.*, 588 F. Supp. 69, 72 (E.D. Wis. 1984), *aff'd*, 776 F.2d 1049 (7th Cir. 1985).

In the instant case, Petitioners have been unable to demonstrate that they were prejudiced or injured by Respondent's nonfiling. Petitioners make vague allegations that they would have acted differently had they known more about the SERO, but they never specify what additional information Respondent was obligated to provide that was not received by Petitioners.[17] Moreover, there is no evidence in the record to support any of Petitioners' assertions.[18] As before, Petitioners rely merely on after-the-fact speculation, nothing more.

---

[17] Petitioners complain that they "could have" been informed that they would have been entitled to greater retirement benefits had they continued working. This protest is illusory, as common sense dictates that any employee would increase his/her retirement benefits by continuing employment. Moreover, the only request for additional information made by any Petitioner was appropriately responded to by Mr. Schrock. (R.51: Deposition of Craig Arnold, p.85; R.53: Deposition of Richard Richardson, p.71).

[18] Petitioners cite pages 36 and 37 of Petitioner Richardson's deposition transcript to support the argument that they would not have accepted the SERO had they been fully informed. However, this testimony merely recounts Petitioner Richardson's meeting with Robert Janks, an executive of Respondent, and a discussion about future positions for Petitioner Richardson. No mention was made of the SERO. This testimony does not even begin to support the proposition that

(Continued on following page)

Petitioners are unable to produce any evidence to support their allegations that they were inadequately or erroneously informed about the SERO, that had a DOL filing been made they would have obtained material information they did not already have, or that they were prejudiced by Respondent's nonfiling. Petitioners acted with full knowledge, accepted the SERO and received handsome lump sum retirement benefits. Under these circumstances, the Petition should be denied.

D. The Petition Should Be Denied Because Petitioners' Appeal From The Dismissal Of Their Pendent State Law Claims Is Not Timely

Petitioners ask this Court to review the Court of Appeals' affirmance of the District Court's dismissal of their pendent state law claims. The Court of Appeals' Judgment (Appendix A to the Petition, pages 11-31) was entered March 28, 1989.[19] Petitioners failed to file a Petition for Writ of Certiorari within ninety (90) days of this Judgment as required by 28 U.S.C. § 2101(c) and Rule 13.1 of the Rules of the Supreme Court of the United States.

(Continued from previous page)

Petitioner Richardson would not have retired had he been provided additional information, that he did not receive information he requested, or that he was mislead with respect to the SERO.

[19] While this Judgment remanded Petitioners' ERISA claims to the District Court, it affirmed the dismissal of pendent state law claims. As of March 28, 1989 (the date of this Judgment), these state claims would not be heard in federal court absent reversal by this Court. Consequently, Petitioners should have sought this Court's review in 1989.

Now, after more than two years have passed since this ninety (90) day period expired, Petitioners have finally filed a Cert Petition. Petitioners' effort is too late – as to this question the Petition is jurisdictionally deficient and must be denied.

In addition, this question is moot. The pendent state law claims at issue continued to be litigated in the Michigan state courts (specifically, the Wayne County Circuit Court). Respondent has learned that these claims were settled, and the underlying action dismissed.

CONCLUSION

The questions presented in the Petition involve alleged questions of fact, and all of the questions presented were fully considered and correctly decided by the District Court and the Court of Appeals. As a result, these questions are simply not of the caliber justifying United States Supreme Court review. Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM G. JAMIESON*
GARY R. CHOPP
JEFFREY R. LEARNED
VICTOR J. TORRES
DENENBERG, TUFFLEY,
BOCAN, JAMIESON, BLACK,
HOPKINS & EWALD, P.C.
3000 Town Center, 28th Floor
Southfield, Michigan 48075
(313) 358-5500

WILLIAM H. MORMAN
AUTOMOBILE CLUB OF MICHIGAN
One Auto Club Drive
Dearborn, Michigan 48126
(313) 336-1048

Attorneys for Respondent

**Counsel of Record*

DATED: September 25, 1991